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No. 97-1959

In the Supreme Court of the United States

OCTOBER TERM, 1997

DOW JONES & COMPANY, ET AL., PETITIONERS,

v.

PRESIDENT WILLIAM JEFFERSON CLINTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT THE WHITE HOUSE IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court may, when it finds that contemporaneous public attendance at a grand jury ancillary proceeding would disrupt its procedures and risk disclosure of grand jury matter, conduct a closed hearing but release redacted briefs and transcripts afterwards.

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BRIEF FOR RESPONDENT THE WHITE HOUSE IN OPPOSITION

The Office of the President of the United States ("White House"), Respondent in the above-captioned matter, respectfully opposes the Petition for a Writ of Certiorari. The dispute between the courts of appeals outlined in the Petition turns out, upon closer examination, not to exist. The other courts of appeals stand in broad agreement with the decision the court of appeals reached in this case—a decision entirely harmonious with this Court's precedents and with the Constitution.

We emphasize at the outset the limited extent of the White House's interest in the instant litigation. As it did in the court of appeals, the White House takes no position on

the district court's closure of litigation relating to privileges held by *individuals*, whether or not those individuals are also government employees. The White House's only concern here is the degree of public access that is proper to litigation over testimonial privileges held by government officers acting as such.

STATEMENT OF THE CASE

In early 1998, the Office of Independent Counsel ("OIC") filed, in the U.S. District Court for the District of Columbia, three motions to compel senior presidential advisors to testify before a grand jury. The motions were properly filed under seal pursuant to Fed. R. Crim. P. 6(e)(6) and D.D.C. R. 302,[1] and were maintained under seal by the district court. The OIC's motions sought, inter alia, to compel the witnesses to disclose communications that the White House asserted were covered by the presidential communications privilege, the attorney-client privilege, and the attorney work product doctrine. *See* White House Br. in Opp., *United States* v. *Clinton*, No. 97-1924, at 2–3. The district court fixed a briefing schedule on the motions to compel, and heard argument on the factual and legal issues on March 20 and March 24, 1998.[2]

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[1] The pertinent text of these provisions is reproduced in Petitioner's Appendix ("Pet. App.") at 38a–39a.

[2] The March 20, 1998 hearing chiefly involved the assertions of official privileges, and a redacted transcript of that hearing has been released to the public. The March 24, 1998 hearing chiefly involved matters other than the assertions of official privileges, and that proceeding has been preserved under seal. The district court has also released portions of the arguments of counsel on February 18 and 19, 1998, to the extent they related to official privilege issues and did not reveal grand jury matters.

Although fully cognizant of the several motions previously filed by the media organizations requesting public access to sealed proceedings, the district court found as a fact that contemporaneous public attendance would disrupt its proceedings. The court found that the issues before it necessarily involved what transpired before the grand jury, and discussions of the legal issues could not readily be separated from discussions of sealed grand jury material. (Pet. App. 41a–42a). The district court found that "it would be too disruptive to stop the hearing and clear the courtroom every time that Rule 6(e) material is to be mentioned." (*Id.*). In concluding that the hearing on the OIC's motions to compel should not be open to the public because of the unavoidable need to discuss grand jury matters, the district court acted well within its authority under Fed. R. Crim. P. 6(e)(5), requiring that any "hearing on matters affecting a grand jury proceeding . . . be closed to the extent necessary" to preserve grand jury secrecy. See also D.D.C. R. 302.

Recognizing and accommodating the public interest in its proceedings, however, the district court ordered the parties to submit proposed redactions to their pleadings and the hearing transcript. The parties did so, and the district court released redacted copies of the pleadings and transcript to the public.

On the media organizations' appeal, the court of appeals upheld the district court's finding that it would unduly disrupt the proceedings if the courtroom had to be cleared every time grand jury matters came up for discussion. It is worthwhile to restate the court of appeals' analysis in pertinent part:

> As a matter of judicial administration, initially closing all ancillary proceedings makes good sense. If a hearing is about something "affecting" a grand jury investigation, there will nearly al-

> ways be a danger of revealing grand jury matters. Consider a challenge to a witness's claim of testimonial privilege. The prosecutor appears before the Chief Judge seeking an order to compel testimony. The witness's identity, the fact that he was subpoenaed to testify, the fact that he invoked the privilege in response to questions, the nature of the questions asked—all these would be, according to our precedent, . . . "matters occurring before the grand jury." To suppose that the First Amendment compels the court to conduct such hearings by placing the witness behind a screen and by emptying the courtroom each time a grand jury matter reaches the tip of an attorney's or the judge's tongue is to suppose the ridiculous. We fully agree . . . that "courts cannot conduct their business that way," nor should they be compelled to do so.

(Pet. App. 11a–12a (citations omitted)).[3]

The court of appeals proceeded to apply to Petitioners' request the two-part "experience" and "logic" test this Court set forth in *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) (*"Press-Enterprise II"*). (Pet. App. 13a). As to the "experience" test, the court of appeals noted that grand jury proceedings themselves (which Petitioners correctly point out are not directly at issue here) were secret by law and not

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[3] As the quoted passage makes clear, the court of appeals simply did not, as Petitioners would have it, "f[i]nd it 'ridiculous' even to suggest that the First Amendment might give the public a right to ask" for admittance to a sealed hearing. (Pet. 8–9). What the court of appeals found "ridiculous" was a revolving-door hearing in which scores of journalists would have been repeatedly shuffled in and out of the courtroom as Rule 6(e) matters came up for discussion.

subject to a tradition of media access. (Pet. App. 6a–7a). Accord *Douglas Oil Co.* v. *Petrol Stops N.W.*, 441 U.S. 211, 218 & n.9 (1979) ("[w]e consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings"; "[s]ince the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye").

The court of appeals found "too few examples of open ancillary hearings . . . in the grand jury context" (Pet. App. 16a) to support a colorable First Amendment claim, and found that "grand jury proceedings give rise to strong countervailing considerations" (*ibid.*) that support closing grand jury ancillary proceedings, at least initially. It recommended that the district court consider establishing a public docket (Pet. App. 17a–18a), vacated the district court's ruling regarding certain other transcripts that do not concern the White House (*id.* at 18a–20a), and in all other respects affirmed the district court (*id.* at 22a).

Significantly, at no time have Petitioners been completely deprived of information about the proceedings below. When proceedings before the courts below involved purely legal issues as to which there was no risk of disclosing grand jury matter, those courts unerringly opened their proceedings to the public to the maximum extent possible. Thus, for example, the argument in the court of appeals on Petitioners' requests for access was held in open court. See Neil A. Lewis, *Press Appeals for Access to Grand Jury on Clinton*, N.Y. TIMES, Apr. 9, 1998, at A20. The recent arguments before the court of appeals concerning the attorney-client privilege of a governmental client were also open, although the court of appeals held a separate sealed proceeding for the consideration of issues other than governmental privileges. See Ste-

phen Labaton, *Lewinsky Case and 'Privilege' Fought in Court*, N.Y. TIMES, June 30, 1998, at A1, A16.[4]

REASONS FOR DENYING THE WRIT

I.
THE COURTS OF APPEALS ARE NOT IN DISAGREEMENT

The decision of the court of appeals in this case was correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is not warranted.

The Petition contends that the courts of appeals disagree over the meaning and application of the "experience" part of the two-part test this Court set forth in *Press-Enterprise II*. On one side of the dispute, Petitioners say, stand the courts of appeals for the Fourth and Fifth Circuits, which "treat[] the 'experience' factor as an essential prerequisite," as Petitioners believe the court of appeals did in this case. Pet. 17 (citing *Baltimore Sun Co.* v. *Goetz*, 886 F.2d 60, 64–65 (4th Cir. 1989), and *Calder* v. *IRS*, 890 F.2d 781, 783–784 (5th Cir. 1989)). On the other side, Petitioners place "the Second, Third and Ninth Circuits" (Pet. 15), which allegedly have

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[4] Similarly, as had the district court before it, the court of appeals ordered the parties to produce redacted versions of their briefs, which were released on June 25, 1998, four days before the oral argument. In the briefing before this Court on the OIC's petition for a writ of certiorari before judgment in the Court of Appeals (*United States* v. *Clinton*, No. 97-1924), the White House submitted a brief that was open to the public in its entirety, and the OIC prepared public versions of its briefs from which grand jury materials had been redacted. A tremendous quantity of accurate information about both sides' legal positions has been made available to the public in a timely fashion.

"concluded that the 'experience' factor is *not* a necessary prerequisite." Pet. 16 (citing *United States* v. *Suarez*, 880 F.2d 626, 631 (2d Cir. 1989), *United States* v. *Simone*, 14 F.2d 833, 837–840 (3d Cir. 1994), and *Seattle Times Co.* v. *United States District Court*, 845 F.2d 1513, 1517 (9th Cir. 1988)).

An examination of those precedents, however, shows that they addressed media access issues in contexts quite different from the one presented to the courts below. Petitioners' cases show, not that the courts of appeals have interpreted *Press-Enterprise II* differently, but only that the result of the settled two-part test may differ depending on the facts to which it is applied. The fact that courts of appeals confronted with diverse factual and legal situations have reached diverse results shows proper application, not misinterpretation, of *Press-Enterprise II*.

What is more, case law from the Second, Third, and Ninth Circuits confirms that, when presented with the same question as the court of appeals in this case, those courts agree with courts below that no First Amendment right of access attaches to ancillary proceedings that may reveal grand jury matters. These precedents confirm that no disagreement exists among the courts of appeals that would warrant this Court's review on certiorari.

A. The Ancillary Proceedings At Issue Here Involved Grand Jury Matters Protected By Rule 6(e)

The district court correctly perceived that discussions of grand jury witnesses' assertions of privilege would necessarily require some discussion of matters occurring before the grand jury—matters Rule 6(e) requires to remain confidential. (See Pet. App. 41a–42a). The court of appeals agreed, ruling that "[t]he witness's identity, the fact that he was sub-

poenaed to testify, the fact that he invoked the privilege in response to questions, the nature of the questions asked"—all of which would arise during any proceedings on a challenged claim of testimonial privilege—would lie within Rule 6(e)'s strict requirement of secrecy. (Pet. App. 11a).

Petitioners do not—and cannot—challenge this conclusion, on which both the district court and the court of appeals agreed. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); accord *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840–841 (1996); *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967). Accordingly, for purposes of assessing the arguments in the Petition, it has been established conclusively that the hearings to which Petitioners sought access necessarily involved matters the law required to remain confidential.

B. The Second, Third, And Ninth Circuit Cases On Which Petitioners Rely Did Not Involve Historically Closed Proceedings

None of the cases on which Petitioners rely to demonstrate a circuit split involved grand jury ancillary proceedings, and those cases are simply inapposite to the question before the courts below. Contrary to Petitioners' assertion, the Second, Third, and Ninth Circuits have not "concluded that the 'experience' factor is *not* a necessary prerequisite" (Pet. 16) when evaluating media requests for access under *Press-Enterprise II*. All three of Petitioners' cases are distinguishable, because they involved novel types of judicial pro-

ceedings for which no history relevant to the "experience" test existed.

The Second Circuit addressed whether the First Amendment provided a presumptive right of access to CJA vouchers, which document the payment of expenses for court-appointed defense experts in a criminal trial. See *Suarez*, 880 F.2d at 628. The case said nothing about the right of access in *pretrial* proceedings such as grand jury investigations or proceedings ancillary thereto.

In evaluating the "experience" test of *Press-Enterprise II*, the court of appeals did not hold that the test was unnecessary, but instead concluded that the novelty of the proceeding at issue—the CJA expense voucher process—deprived it of any data from which it could reach a conclusion one way or the other on historical openness. See *Suarez*, 880 F.2d at 631. Finding that "experience" counseled neither openness nor closure, the court of appeals presumed a right of public access. *Ibid.*

The Third Circuit case on which Petitioners rely involved a post-trial inquiry into juror misconduct. Here, too, the historical record was essentially silent on the question of public access to such proceedings. The court, expressly applying both the "experience" and "logic" tests of *Press-Enterprise II*, searched in vain for "cases . . . in support of either openness or closure for this type of post-trial proceeding." *Simone*, 14 F.3d at 838. The government cited several cases, but the court of appeals found them to be "of such recent vintage they do not establish a tradition of closure." *Ibid.* Finding no history one way or the other, the court concluded that "on the whole, the 'experience' prong of the 'logic and experience' test provides little guidance in this case." *Ibid.* Although it found the available precedents unilluminating on

the "experience" test, the court never, contrary to Petitioners' portrayal, found "experience" to be an irrelevant or unnecessary consideration.

Petitioners' Ninth Circuit case presented another situation in which the novelty of the proceeding deprived the court of historical evidence relevant to the "experience" test. Although bail proceedings, which were at issue in that case, were not themselves innovative, recent statutory reforms had greatly changed the significance of the proceedings and the procedures employed. See *Seattle Times*, 845 F.2d at 1516. Confronted with what was, in effect, a new type of proceeding, the court found that "the historical tradition surrounding bail proceedings is much less significant" when considering a right of access. *Ibid.* Once again, the court of appeals never found the "experience" test unnecessary or irrelevant; it only found the historical record inconclusive.

Thus understood, none of the cases on which Petitioners rely are relevant here, for in none of them did the courts address "proceedings [that] have been closed to the public" "[s]ince the 17th century." *Douglas Oil*, 441 U.S. at 218 n.9. A court may find no relevant evidence of "experience" when dealing with a new type of proceeding, but that in no way undercuts the courts' consistent recognition that, when a historical tradition of open or closed proceedings exists, it must be preserved under *Press-Enterprise II*.

C. The Second, Third, And Ninth Circuits Agree With The Courts Below In The Circumstances Here

When confronted with factual situations analogous to the grand jury ancillary proceedings at issue here, the Second, Third, and Ninth Circuits have agreed with the courts below that the "experience" test of *Press-Enterprise II* applies and

is not met. The uniform recognition among the courts of appeals that proceedings that may reveal grand jury matter should remain closed belies Petitioners' assertion that the Second, Third, and Ninth Circuits misunderstand the "experience" test or apply it differently from the courts below.

In *In re Grand Jury Subpoena*, 103 F.3d 234 (2d Cir. 1996), members of the media sought access to a district court hearing on a grand jury witness's claim of unlawful electronic surveillance. *Id.* at 236. The Second Circuit found that the hearing on the witness's claim would "pose[] a significant risk of disclosing information which has occurred or which may occur before the grand jury." *Id.* at 238. Although the court, expressly applying both parts of the *Press-Enterprise II* test, *id.* at 242, believed it "possible" that a presumptive, qualified right of access could attach, it was "overcome in the grand jury context by the overriding interest in secrecy." *Ibid.*

Similarly, the court of appeals in *United States* v. *Smith*, 123 F.3d 140 (3d Cir. 1997), refused to grant media organizations access to a proceeding concerning whether a prosecutor had improperly disclosed Rule 6(e) material. The court of appeals "conclude[d] that grand jury secrets might be disclosed by the briefs and hearing to which the newspapers seek access[.]" *Id.* at 143. The court considered the "experience" test of *Press-Enterprise II* at length. See *id.* at 146–151. Because "the briefs and hearing will necessarily reveal grand jury material," the court of appeals found "that the briefs and hearing to which the newspapers seek access are afforded secrecy under Fed. R. Crim. P. 6(e)(5) and 6(e)(6) . . . . As such, there is no presumptive First Amendment right of access thereto." *Id.* at 151. This holding rested primarily, and explicitly, on the history of confidentiality of grand jury and ancillary proceedings, a history the court was required to

consider under the "experience" test of *Press-Enterprise II*. See, *e.g.*, *id.* at 148 ("[h]istorically, such proceedings have been closed to the public").

Finally, in *Times Mirror Co.* v. *United States*, 873 F.2d 1210 (9th Cir. 1989), the court of appeals addressed whether the First Amendment provided a presumptive right of access to a pre-indictment FBI search warrant and accompanying affidavit. Discussing the "experience" test in some detail, the court analogized the pre-indictment investigation to "grand jury proceedings," which "[t]raditionally . . . have been kept secret even though they are judicial proceedings which are closely related to the criminal fact-finding process." *Id.* at 1213. Reviewing the media organizations' request for access, the court of appeals found "no historical tradition of open search warrant proceedings and materials." *Id.* at 1214. Accordingly, the court held that "[h]istorical experience . . . furnishes no support for the claimed right of access to warrant proceedings[.]" *Ibid.*

The lessons of these cases are clear and may be simply stated: circumstances matter. Where a long historical tradition of confidentiality exists, as with grand jury proceedings, the "experience" test of *Press-Enterprise II* weighs heavily against any First Amendment right of access. Where proceedings share a long history of openness, as with criminal trials[5] or voir dire proceedings,[6] the "experience" test supports a presumptive First Amendment right of access. Where *no* tradition exists one way or the other, as in the case of proceedings too novel for such a tradition to have developed, the

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[5] See, *e.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980).

[6] See, *e.g.*, *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984).

"experience" test has no work to do, and the inquiry naturally will turn more on the "logic" test of *Press-Enterprise II*. Different conclusions may result in different factual contexts, but this says nothing about the validity and proper application of *Press-Enterprise II*, and creates no disagreement among the Circuits warranting this Court's intervention.

II.
PRUDENTIAL CONSIDERATIONS WEIGH AGAINST THIS COURT'S DISCRETIONARY REVIEW

Even if a bona fide disagreement among the Circuits existed, and it does not, several factors make this case a poor candidate for discretionary review on certiorari.

First, it is far from clear that the issues the Petition attempts to raise are squarely presented here. The court of appeals ruled that, insofar as the Petitioners sought "pleadings and papers," the district court's Local Rule 302 "gives [the press] the most it could expect from its constitutional claim." (Pet. App. 8a). That rule expressly requires pleadings in grand jury ancillary matters to be filed and maintained under seal, and specifies that "[a]ll hearings on matters affecting a grand jury proceeding shall be closed[.]" (Pet. App. 39a). Petitioners did not challenge the constitutionality of Local Rule 302, or of Fed. R. Crim. P. 6(e), in the court of appeals (Pet. App. 8a), and they expressly disavow any intent to raise such a claim for the first time before this Court. (Pet. 9 n.6). But those rules, unless they are unconstitutional, appear to resolve this dispute conclusively against Petitioners. This Court ordinarily would decline to consider an abstract question of constitutional law, such as the Petition presents, while pretermitting consideration of the statutes and rules that may

supply independent grounds for decision. See *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Conservation of the Court's adjudicative resources counsels deferring consideration of the issues Petitioners attempt to raise until a case squarely presenting them arises.

Second, the Petition does not challenge the shared conclusion of both courts below (Pet. App. 11a–13a, 41a–42a) that public attendance at the hearings would be disruptive. See *Graver*, 336 U.S. at 275. Requiring the district court to clear the courtroom every time Rule 6(e) matters came up for discussion would result in a disjointed, unfocused proceeding that would hamper the court's consideration of the important issues before it, while not meaningfully advancing the public interest in access to non-sealed proceedings. See *Smith*, 123 F.3d at 152–154. It is impossible to conclude that the courts below erred in granting Petitioners full access to redacted pleadings and transcripts, while denying them only the right to attend the district court's hearings contemporaneously.[7]

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[7] The court of appeals noted that its own proceedings differed from those before the district court, because the issues presented to it had been distilled in advance to present purely legal, rather than factual questions, making it better able than the district court to determine in advance of the hearing whether discussion of grand jury matters would be required. (Pet. App. 12a). Thus, there is no inconsistency in the court of appeals holding open argument on subjects the district court found necessary to maintain under seal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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